THE OTHER PARTY"

(1) Prevention or hindrance by a party to a contract of any occurrence or performance or requisite under the contract for the creation or continuance of a right in favor of the other party, or the discharge of a duty by him, is a breach of contract unless

(b) The terms of the contract are such that the risk of such prevention or hindrance by occurs has been assumed by the other party.

Under this provision of the heretofore cited law it could hardly be said that the contract language of the so-called "no damage" clause represents the assumption of the risk of such prevention or hindrance by Public Corp. A cursory examination of the clause fails to disclose the assumption of such risk by Appellant. The most that can be said for such clause is that by reason of its relationship to Subsection (a), that the Contracting Officer may not make payment or compensation for damages because of such hindrance or delay. No prohibition against the institution of suit in a Court of competent jurisdiction for damages for breach of the contract is prescribed.

At the time of the adoption of the V. Virgin Islands Code in 1957, the overwhelming if not unanimous position of the State Courts which had considered the type of "no damage" clause here involved, was that

"Even though a particular delay may fall within the literal meaning of such a provision, the provision will not be enforced if the delay is the result of fraud or an intentional or active interference on the part of the building owner to hinder the benefit of the contract." (emphasis added). 13 Am. Jur. 2d, Building and Construction Contracts, Section 52 as stated in 10 A.L.R. 2d 801 (1949), at p. 865:

> "And the Courts appear to accord that a provision in a Construction Contract relieving a Contractor from liability for delays is not applicable to delays caused by conduct constituting active interference with performance by the contractor".

Numerous cases are cited in support of this statement from A.L.R. 2d, and others have been added. They are not cited here.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

At the time that the United States Court of Appeals for the Third Circuit handed down its decision, it had before it only the appeal of Petitioner with reference to the decision of the Court below. There was no cross appeal by Respondent, excepting from that part of the decision of the Court below which denied the authority reimbursement by way of counsel fees. The appeal the Court had before it, insofar as the matters here presented are concerned was from the decision of the District Court dismissing

the case, but failing to make the requisite special findings of fact and conclusions of law, with no decision whatsoever concerning the question of the applicability of the "no damage" clause.

This Court has consistently held that in reviewing decisions of Territorial Courts involving matters of local concern the reviewing Court should follow the theory of leaving appropriate scope of development of their own systems of law to the Territorial Courts. Bonet v. T. W. C. (T.H.) Inc., 308 U.S. 463, 60 S. Ct. 345, 84 L.Ed. 401 (1940); De Castro v. Board of Commissioners of San Juan, 322 U.S. 451, 64 S. Ct. 1121, 88 L.Ed. 1384 (1944); United States v. Pollard et al, 331 U.S. 256, 91 L.Ed. 1474. This Court said in De Castro v. Board of Commissioners of San Juan, supra, at p. 452:

> ". . . the problem is comparable to that presented when, upon appeals from Federal District Courts sitting in the States, the Federal Appellate Courts are required to follow State law under the rule of Erie R. Co. v. Tompkins, 304 U.S. 64".

In ignoring the District Court's decision, and deciding the case on grounds which the District Court expressly declined to adopt, the Third Circuit usurped the function of the District Court for the Virgin Islands and violated the rules established by this Court for review of decision of Territorial Courts. In so doing, the Third Circuit adopted a rule of law for the Virgin Islands which is contrary to the law of that territory. In effect it adopted a rule of

[illegible] that the [illegible] of [illegible] was [illegible] [illegible] the "[illegible]" [illegible] [illegible] [illegible]